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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HOLLYWOOD PANORAMA TOWER TENANTS ASSOCIATION et al., Plaintiffs and Appellants, v. HOLLYWOOD PANORAMA TOWER, INC., et al., Defendants and Respondents.	B231702 (Los Angeles County Super. Ct. No. BC276627)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Abraham Kahn, Judge. Affirmed.

Law Offices of Pamela A. Mozer and Pamela A. Mozer for Plaintiffs and Appellants.

Yoka & Smith, Christopher Patrik Leyel; Haight Brown & Bonesteel, Jules S. Zeman; Goodkin & Lynch, Dan Goodkin and Steve Yamin for Defendants and Respondents Hollywood Panorama Tower, Inc. and Rouholla Mehdizadeh.

Haight Brown & Bonesteel and Jules S. Zeman for Defendant and Respondent Samson Marian.

Carmen A. Trutanich, City Attorney, Richard M. Brown, General Counsel, Water and Power and Lisa S. Berger, Deputy City Attorney, for Defendant and Respondent City of Los Angeles, acting by and through the Los Angeles Department of Water and Power.

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This decade-old case stems from an electrical fire in a high-rise commercial building that occurred in December 2001. Due to the ensuing power outage and forced vacancy, many tenants suffered damages including loss of personal property. They sued the landlord and certain of its alleged employees. Over time, these defendants were successful in putting an end to the case by opposing a motion for leave to amend the first amended complaint (FAC), obtaining summary judgment, and bringing a motion to quash service of process on one of the defendants. The trial court's rulings on these three matters are now at issue on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The 20-story building at issue is located at 6290 West Sunset Boulevard in Los Angeles (the building) and was owned by respondent Hollywood Panorama Tower, Inc. (HPT). The tenants were mostly small businesses and sometime in 2001 they formed a tenants' association, appellant Hollywood Panorama Tower Tenants Association (HPTTA).[1]

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[1] Designation of the parties is confusing here. Throughout the superior court case, the named plaintiffs were HPTTA and one of its tenants, Hollywood Damage Control & Recovery, Inc. (HDCR), which together filed the notice of appeal. At the time this appeal was filed, HPTTA consisted of six tenants: Blue Light Productions; Chapman Investigations, Inc.; DJ Union; HDCR; RCM Technologies, Inc. and RNR Architects, Ltd. While the appeal was pending, each of these tenants except HDCR settled with respondents HPT, Rouholla Mehdizadeh and Samson Marian. Thus, the only appellant remaining to challenge the summary judgment and the order granting the motion to quash is HDCR.

On December 6, 2001 there was an electrical fire in the building's electrical utility room, which cut off all electricity to the building. The fire was limited to the utility room and no sprinklers went off in the building. The Los Angeles City Fire Department determined the building was unsafe and ordered it closed. The building remained vacant for nearly nine years until 2010. During this time, tenants were allowed limited access to the building to retrieve personal property.

On June 27, 2002, HPTTA and HDCR sued HPT, Rouholla Mehdizadeh and Samson Marian, along with other defendants, for breach of contract, negligence, fraud in the inducement, fraud, specific performance and conversion. On November 20, 2002, HPTTA and HDCR filed the FAC alleging the same causes of action, and also alleging that Mehdizadeh and Marian were the sole shareholders, officers and/or directors of HPT. According to HDCR, at one point there were at least eight separate lawsuits arising from the electrical fire, which involved other tenants, insurance carriers and the City. These actions were eventually deemed related.

The matter proceeded as an ordinary state court action for one year until July 2, 2003, when HPTTA and several tenants filed involuntary bankruptcy proceedings against

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The motion for leave to amend the FAC appears to have been brought only by HPTTA. The denial of that motion had the effect of preventing the City of Los Angeles acting by and through the Los Angeles Department of Water and Power from being added as a defendant. Thus, none of the tenants ever settled with the City because it was never added as a defendant to this action. The City has appeared as a respondent with respect to the challenge of the court's order denying leave to amend the FAC. Counsel for appellants advised us that both HDCR and HPTTA are pursuing this challenge. But in light of the settlement and the fact that the motion was brought only by HPTTA, the HPTTA's only viable challenge would be limited to that part of the order denying the request to add the City as a defendant.

After the briefing on appeal was completed, respondents HPT, Rouholla Mehdizadeh and Samson Marian filed a motion to dismiss the appeal as to HDCR on the ground that it was a suspended corporation for failure to pay taxes. We granted the motion, but reinstated the appeal upon proof of HDCR's certificate of revivorship. We note the issue of whether a certificate of revivorship obtained after the deadline for filing an appeal can validate the appeal is currently pending before the California Supreme Court (*Bourhis v. Lord*, S199887, review granted March 21, 2012).

HPT (*In re Hollywood Panorama Tower, Inc.*, case No. LA 03-27695-ES), after learning that HPT was about to sell the building. The matter was eventually converted to a voluntary Chapter 11 reorganization case. Of the remaining HPTTA tenants that had not settled, HDCR filed the largest proof of claim for $1,224,575.00. Due to the bankruptcy case, the superior court action was stayed for approximately two years from July 9, 2003 through June 9, 2005. The superior court action then proceeded for about two years until it was stayed again from May 23, 2007 through July 29, 2009, pending an appeal filed by another party (*In Chun Lee v. Nourollah Elghanayan* (August 26, 2008, B199258) [nonpub. opn.]).

On October 30, 2009, more than seven years after the original complaint was filed and after HPT had requested a trial date in early 2010, HPTTA filed a motion for leave to file a second amended complaint, seeking to add nine causes of action and three parties, including the City. Three separate oppositions were filed: HPT argued the motion was untimely and the matters were time-barred; the City argued the pleading requirements involving a governmental entity were not met; and Hartford Steam Boiler Inspection & Insurance Company (HSB) (which is not a party to this appeal) argued the delay in amending would cause substantial prejudice. The trial court denied the motion, finding "unexplained delay." HPTTA filed a motion for reconsideration, which the trial court also denied.

A trial date was set for January 11, 2010, but was apparently continued. In September 2010, respondents HPT and Mehdizadeh filed a motion for summary judgment, arguing each of the tenant's leases contained provisions releasing HPT from liability, the electrical fire was caused by the City's equipment and not HPT's equipment, and the tenants were provided notice and opportunity to collect personal property. In opposition, HDCR and HPTTA argued their damages were caused by HPT's failures to cure the building's code violations and the leases were void due to fraud in the inducement. HPT and Mehdizadeh objected to most of HDCR's and HPTTA's evidence. The trial court sustained the objections and granted the motion finding "plaintiffs lack

evidence to support any triable issues of material fact, after defendants' evidentiary objections are sustained."

During the summary judgment proceedings, HDCR became aware that respondent Samson Marian had never answered, and filed a request to enter his default. Marian filed a motion to quash service of summons and complaint on the ground that he was never properly served. The trial court granted the motion to quash and ordered that Marian be dismissed without prejudice. Summary judgment was then entered, and this appeal followed.[2]

DISCUSSION

I. Motion for Leave to Amend

HPTTA contends the trial court abused its discretion in denying its motion for leave to amend the FAC based on a finding of "unexplained delay" without also making a finding of prejudice. We disagree.

A motion to amend a pleading is reviewed for abuse of discretion. (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135.) "While under section 473 of the Code of Civil Procedure and the case authorities pertaining thereto the trial court has wide discretion in allowing the amendment of any pleading [citations], as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown [citations]." (*Id*. at pp. 135–136.) As HPTTA acknowledges, the appellant has the burden of establishing that the court's discretion was abused. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

We reject HPTTA's contention that the trial court abused its discretion in denying the motion for leave to amend based solely on a finding of unexplained or inexcusable delay. "The law is well settled that a long deferred presentation of the proposed

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[2] At the time the notice of appeal was filed, the trial court had issued a minute order granting the motion to quash service, but no formal judgment had been entered. An order granting a motion to quash service of summons is appealable. (Code Civ. Proc., § 904.1, subd. (a)(3).)

amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment." (*Bedolla v. Logan & Frazer*, *supra*, 52 Cal.App.3d at p. 136, citing *Moss Estate Co. v. Adler* (1953) 41 Cal.2d 581, 586.) "The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial." (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939–940; *Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 613 ["[T]he trial court has wide discretion in determining whether to allow the amendment, but the appropriate exercise of that discretion requires the trial court to consider a number of factors: '*including the conduct of the moving party and the belated presentation of the amendment*'"]; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 ["appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is "'offered after long unexplained delay . . . or where there is a lack of diligence . . . ."'"]; *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp*. (2005) 130 Cal.App.4th 1078, 1097 [upholding denial of posttrial motion for leave to amend where "motion did not provide an excuse for this delay"].)

There is no explanation in the motion for leave to amend or the supporting declarations as to why the nine new causes of action and the three new parties were not added to the complaint literally years earlier. HPTTA's attorney merely stated that with respect to four of the new causes of action of which she was aware at the time of the original complaint (constructive eviction, intentional and negligent interference with prospective business and negligent misrepresentation), "I had not rushed to add them prior to the new stay, believing falsely that I had time to move to amend the pleadings." She also submitted evidence that one of her clients learned "in or about 2006" that its property had been vandalized and destroyed at the building. But again, she failed to explain why she waited almost four years to attempt to add the four new causes of action relating to these incidents (trespass, negligent trespass, waste and invasion of privacy). She also failed to explain why she and her client were not more diligent in inspecting the

property prior to 2006, particularly as part of her investigation and discovery of the case she had filed in 2002.

With respect to adding the City, she declared that the City should be added because "HPT has alleged continually that the sole reason that the fire occurred and the power never restored was due to [the City's] actions." But once more, she provided no explanation for not seeking to add the City years earlier, particularly when HPT was "continually" blaming the City for the tenants' alleged damages.

Under these circumstances, we conclude that HPTTA did not meet its burden on appeal of showing the trial court abused its discretion in denying the motion for leave to amend based on its finding of delay.

HPTTA also filed a motion for reconsideration seeking to explain the delay, which referenced the personal difficulties of its attorneys. To the extent HPTTA is also challenging the trial court's denial of the motion for reconsideration, we again conclude that it has failed to meet its burden of demonstrating abuse of discretion. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212 [denial of motion for reconsideration reviewed for abuse of discretion].) As the City points out, the trial court denied HPTTA's motion for reconsideration as an "unauthorized" attempt to present "preexisting facts that could have been raised in the prior motion," finding that "counsel should have diligently anticipated the need to address delay in the initial motion because that relates to well-established and published law." The trial court also found that if it were to again address the merits of the motion for leave to amend, it would still deny the motion "based upon a finding of unexplained delay."

In the opening appellate brief, HPTTA merely asserts "it is abundantly clear that the Motion [for reconsideration] adhered to [Code of Civil Procedure] § 1008," but does not set forth the statutory elements or explain how it has complied with them. HPTTA also asserts "the different facts were presented because of the Court's ruling," but does not cite to the record or otherwise identify the facts or explain how they are different. Finally, HPTTA asserts that Code of Civil Procedure section 473 "was also applicable," presumably because the trial court's ruling "surprised" counsel. But, again, the statutory

elements are not set forth and no supporting argument is made. It is a fundamental rule of appellate law that "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Thus, it is not our job to cull the record in search of error. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700.)

II. Motion for Summary Judgment

HDCR contends the trial court erred in granting the motion for summary judgment filed by HPT and Rouholla Mehdizadeh. We disagree.

A. Standard of Review

We review a grant of summary judgment de novo, considering "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) If there is no triable issue of material fact, "we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in

the trial court or first addressed on appeal." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

The general rule is that summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) A defendant "moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving defendant may meet this burden either by showing that one or more elements of a cause of action cannot be established or by showing that there is a complete defense thereto. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co., supra,* at p. 850.) "'[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . [;] the defendant need not himself conclusively negate any such element . . . .' [Citation.]" (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 894.) Once the moving party's burden is met, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of material fact. (*Silva v. Lucky Stores, Inc., supra,* 65 Cal.App.4th at p. 261.) The plaintiff must produce "substantial" responsive evidence sufficient to establish a triable issue of fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Ibid*.) """When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork."' [Citation.]" (*Mills v. U.S. Bank, supra,* at p. 894.)

B. The Pleadings and Evidence

HPT and Mehdizadeh moved for summary judgment on three grounds: (1) each of the tenant leases expressly released HPT from liability for the damages being sought; (2) each tenant's claim was defective for lack of causation between any acts of HPT and

Mehdizadeh and the alleged resulting damages because the electrical fire was caused by the City; and (3) to the extent damages were being sought for loss of personal property, each tenant was given notice and an opportunity to remove personal property from the building.

The moving parties submitted copies of the leases between the six remaining tenants of HPTTA, including HDCR, and HPT or its predecessor. As pertains to HDCR, the only remaining plaintiff tenant that has not settled, its lease with HPT required it to maintain specific types of insurance during the term of the lease, including comprehensive general liability insurance to protect both lessee and lessor "against liability arising out of the use, occupancy or maintenance of the Premises," and property insurance for the benefit of the lessee to include "replacement cost fire and extended coverage insurance, with vandalism and malicious mischief . . . in an amount sufficient to cover not less than 100% of the full replacement cost . . . of all of Lessee's personal property, fixtures, equipment and tenant improvements." HDCR's lease also included a waiver of subrogation provision, providing that "Lessee and Lessor each hereby release and relieve the other, and waive their entire right of recovery against the other for direct or consequential loss or damage arising out of or incident to the perils covered by property insurance carried by such party, whether due to negligence of Lessor or Lessee or their agents, employees, contractors and/or invitees." HDCR's lease also provided that "Lessee, as a material part of the consideration to the Lessor, hereby assumes all risk of damage to property of Lessee or injury to persons, in, upon or about the Office Building Project arising from any cause and Lessee hereby waives all claims in respect thereof against Lessor." Finally, HDCR's lease provided that "Lessee hereby agrees that Lessor shall not be liable for injury to Lessee's business or any loss of income thereform or for loss of or damage to the goods, wares, merchandise or other property of Lessee, . . . whether such damage or injury is cause by or results from theft, fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or

from any other cause, whether said damage or injury results from conditions arising upon the Premises or upon other portions of the Office Building Project."

The moving parties relied on the expert witness declaration of Malcolm Lewis, P.E., a registered electrical engineer with more than 29 years of experience in the design and performance of building electrical systems, including the "analysis of a broad range of failures and identification of their causes." He and his company, CTG Forensics, Inc. have been "in the full-time business of analyzing electrical failures for over 10 years," including failures in large commercial buildings. His company and another company, Electric Forensics, Inc., were retained by HPT's attorneys in 2004 to determine the cause of the electrical fire at HPT. As part of their investigation, they reviewed numerous documents from the Los Angeles Department of Water and Power (LADWP). Based on the two company's collaborative analysis, his experience and training, Lewis opined: "[T]his electrical fault and explosion started in and was caused by LADWP's network protector and the high voltages imposed on them by the LADWP system. The resulting failure directly caused additional transient high voltages to travel into the HPT switchgear resulting in catastrophic damage, and long term power outage in the building. It is further my opinion that the electrical fault event that occurred in the equipment belonging to LADWP was not caused by the building or the equipment belonging to the building."

Mehdizadeh, who was 86 years old, submitted a declaration stating that at the time of the electrical fire and outage he was an assistant to HPT and worked with HPT's management company "to collect rents from tenants and to coordinate HPT's ongoing efforts to maintain and manage the property." He declared that he has never had any ownership interest in HPT or the building, that he never personally entered into any contractual relationships with tenants of the building, and that he never made any representation to the tenants without believing it to be truthful.

In its opposition, HDCR argued that its lease with HPT was void *ab initio* due to fraud in the inducement. HDCR relied in part on paragraph 6.2(a) of the lease executed by HDCR on May 7, 1999, in which "Lessor warrants to Lessee that the Premises, in the state existing on the date that the Lease term commences, . . . does not violate any

convenants or restrictions of record or any applicable building codes, regulation, or ordinance in effect . . . . in the event it is determined that this warranty has been violated, then it shall be the obligation of the Lessor after written notice from Lessee, to promptly, at Lessor's sole cost and expenses, rectify any such violation." HDCR also argued that the moving parties made misrepresentations about these warranties. HDCR argued that the exculpatory provisions in the lease were illegal because they purported to exempt HPT from code violations. HDCR further argued that its damages were caused by the closure of the building, not the fire, and "the inability to obtain [its] personal property and the grave and unexpected interference with [its] business caused by [its] constructive eviction." Finally, HDCR argued that the building was closed due to HPT's failure to remedy the code violations.

HDCR submitted the declaration of its owner, Gerald Schneiderman, who attached documents from the Los Angeles City Fire Department and the Department of Building and Safety, reflecting building citations, and a plea of nolo contendere by HPT to code violations. HDCR also submitted the declaration of Kevin Garrity, a registered electrical engineer and 27-year employee of the LADWP, with 28 years of experience in designing and constructing electrical systems and electrical sub-stations, including analyzing electrical component and system failures to determine the cause of such failures. His investigation of the electrical fire at the building was a collaborative effort with two other LAWPD employees. Based on his experience, training and investigation, he opined: "[T]his event started in and was caused by a fault and failure in the [HPT] chiller motor circuit breaker and main circuit breaker which then propagated into and damaged the LADWP electrical equipment at the location. There is no evidence of an internal failure in the LADWP transformer and there is no evidence of any transient voltage spikes in the two 34.5kv underground electrical cables that provided power to the [HPT]."

HDCR also submitted a declaration from its attorney, Pamela Mozer, who requested the court to take judicial notice of numerous documents, including the plea of nolo contendere.

The moving parties filed evidentiary objections, which HDCR opposed. The trial court sustained the evidentiary objections and granted the motion for summary judgment, finding the plaintiffs lacked evidence to support any triable issue of material fact and "relied upon incompetent conclusions lacking in foundation."

C. The Motion for Summary Judgment Was Properly Granted

We first address HDCR's challenges to the evidentiary objections, and then turn to each specific cause of action. We conclude that HDCR failed to establish a triable issue of material fact as to any of its causes of action against moving parties HPT and Rouholla Mehdizadeh.[3]

Evidentiary Objections

Trial court evidentiary rulings on summary judgment are reviewed for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680.) The party challenging the rulings has the burden of establishing abuse, which will be found only if the trial court's order exceeds the bounds of reason. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.)

With respect to the declaration of Gerald Schneiderman, the moving parties objected to the attached documents on the grounds of lack of foundation and inadmissible hearsay. HDCR argues the attached building citations should have been admitted as a business records exception to the hearsay rule.[4] We disagree. While Schneiderman's

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[3] HDCR acknowledged in its opposition that its claims for specific performance and declaratory relief were no longer viable in light of the fact that the building had been sold and was converted to luxury apartments.

[4] Evidence Code section 1280 provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition,

declaration states that the citations and "all of the applicable files" attached were obtained from the Los Angeles City Fire Department and the Department of Building and Safety after "making public records requests under the Freedom of Information Act," there is no description of what records were requested, when the requests were made, when the documents were obtained, who produced the documents, and whether the documents were authenticated by a custodian or other authorized person. There are no copies of the requests or any custodian certificates in the record, only piles of somewhat illegible documents. Under these circumstances, we find the requirements of Evidence Code section 1280 were not met and that the documents were properly excluded.[5] We also find the plea of nolo contendere by HPT in a criminal case was properly excluded under the hearsay rule (*Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1056 ["a court cannot take judicial notice of the truth of hearsay statements simply because the statements are part of a court record"]), and under Penal Code section 1016, subdivision (3) [a nolo contendere plea "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based"]). We also find that a letter attached to Schneiderman's declaration as Exhibit F, dated July 25, 2001 from the attorney for the building management to all tenants, stating in part that the "building management . . . is in compliance with all laws," is inadmissible hearsay. HDCR argues that it should have been admitted either as an authorized admission under Evidence Code section 1222, but no showing was made that the letter was authorized, or as a statement against interest under Evidence Code section 1230, but no showing was made that the author of the letter was unavailable as a witness.

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or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[5] The trial court also properly sustained objections to the declaration of Battalion Chief Michael Greenup of the Los Angeles City Fire Department on the grounds the declaration was untimely and did not attach the documents it purported to authenticate.

HDCR also complains that the trial court sustained "numerous objections . . . leveled against the Schneiderman Declaration wherein his testimony was about basic personal knowledge and observations." HDCR then cites generally to three pages of moving parties' objections to 11 paragraphs of the declaration without addressing each specific objection, and ignores that objections were made on other grounds as well. Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and briefed, which HDCR has not done here. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.)

With respect to the declaration of Kevin Garrity, HDCR argues that the trial court erred in striking his opinion testimony because his experience qualified him as an expert under Evidence Code section 720, subdivision (a), "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." We agree with HDCR that Garrity's experience, education and training qualified him as an expert in electrical engineering. Garrity holds both a Bachelor of Science degree and a Master's degree in electrical engineering, and is a Ph.D. candidate in electrical engineering at the University of Southern California. His 28 years of experience in designing and constructing electrical systems includes "analyzing electrical component and system failures in order to determine the cause of such failure." Thus, we find he has sufficient forensic experience to render the opinion that the building's damaged chiller motor circuit breaker was the point of failure, and not LADWP's equipment. He explained the basis for his opinion by stating that that there was no damage to the circuit breakers above and below the chiller motor circuit breaker, and that if the LADWP network protector had failed first there would have been no available current to propagate to the building. Moreover, he was present at the building the day after the electrical fire occurred and personally inspected the damaged electrical equipment, which he also inspected on subsequent days. Because he also described the documents he reviewed to determine that that there were

no transient voltage spikes in the two electrical cables that provided power to the building, his failure to attach these specific documents is not fatal to his opinion. We conclude that the trial court abused its discretion in striking Garrity's expert opinion as to the source of the electrical fire.

But we find no error in the trial court's striking of Garrity's percipient witness testimony that the "LADWP was willing to provide temporary power to the involved building after the incident but was unable to do so because the Los Angeles Department of Building and Safety and the Los Angeles Fire Department would not permit the building to be energized due to various Building Code and Fire Code violations." HDCR argues this statement was based on Garrity's personal knowledge. But Garrity provided no factual basis to support his knowledge. He did not identify where he got this information, e.g., whether he reviewed any reports or documents from either agency or whether he spoke to anyone at either agency and what qualifications such person had to make this conclusion. Code of Civil Procedure section 437c, subdivision (d) requires opposing declarations to be based on personal knowledge and to "show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." This requirement was not satisfied here.

Finally, with respect to the declaration of HDCR's attorney Pamela Mozer, HDCR argues the trial court improperly sustained objections to those portions of her declaration that "worked to explain the information contained in the Plaintiffs' Request to Take Judicial Notice" and to the exhibits themselves. HDCR specifically takes issue with the objections to declarations made in another case and to the nolo contendere plea. We have already addressed the inadmissibility of the plea. The other objections were also properly sustained as being irrelevant, constituting hearsay and lacking foundation. "[W]hile we take judicial notice of the *existence* of the documents in court files, we do not take judicial notice of the truth of the facts asserted in such documents." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266.) Indeed, this is especially true here where the facts in the judicial record are subject to dispute, i.e., allegations in a declaration.

We now turn to the specific causes of actions alleged in the FAC.

D. Breach of Contract Cause of Action

The FAC alleged that the moving parties breached HDCR's lease by breaching the implied covenant of good faith and fair dealing and "various warranties" and "[n]umerous other responsibilities," which we note are generally found under the heading of "Operating Expenses" in the lease. These included the provisions that at the time the lease was executed the building was not in violation of any building code, regulation or ordinance, and that the landlord would properly maintain the building. The well established elements for breach of contract include (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages. (*Acoustics, Inc. v. Trepte Constr. Co.* (1971) 14 Cal.App.3d 887, 913.)

In their motion for summary judgment, the moving parties presented a defense to the breach of contract claim by showing that HDCR's lease with HPT contained assumption of risk provisions that expressly exempted HPT from liability for damage to HDCR's property or business for conditions occurring at the building, and that required HDCR to maintain insurance for such losses. In its opposition, HDCR argued that these lease provisions are unenforceable because provisions exempting one from fraud, willful injury to the person or property of another and violations of law are against public policy and void. (Civ. Code, § 1668.) As discussed below, however, HDCR failed to present any admissible evidence of fraud, willful injury to others or building code violations.

Moreover, HDCR failed to present any admissible evidence of damages. Gerald Schneiderman declared that HDCR was harmed in two ways: "Our business damages resulted from the lack of heat, air conditioning and working elevators, when the property was open and the actual closure with the inability to obtain our personal property after it was red-tagged." But HDCR did not submit any evidence showing the business was

actually damaged by the alleged lack of heat, air conditioning or working elevators. No description or amount of such damages was provided.

With respect to damages flowing from the closure of the building, it is undisputed that the City, not HPT, made the decision to close the building and to keep it closed. While HDCR has taken the position that the closure was due to HPT's failure to cure building code citations, there was no admissible evidence of any building citations. As we previously concluded, the trial court properly excluded the citations and the nolo contendere plea, as well as the testimony of Kevin Garrity that the City would have restored power to the building but for the citations. Claims and theories not supported by admissible evidence are insufficient to raise a triable issue of material fact. (*Rochlis v. Walt Disney Co*. (1993) 19 Cal.App.4th 201, 219.)

Although we have concluded that the trial court abused its discretion in striking Garrity's expert opinion that the electrical fire originated in the building's equipment, which contradicts the opinion of the moving parties' expert that the LADWP's equipment was the source of the fire, these contrary opinions are insufficient to create a triable issue of material fact, for two reasons. First, Garrity's declaration provides no explanation or reason why HPT's chiller motor circuit breaker failed. In other words, even if the source of the electrical fire was in the building's equipment and not in the LADWP's equipment, there was no evidence presented that the failure of the circuit breaker was caused by HPT or its failure to properly maintain its equipment. Second, even if HDCR had shown that HPT failed to properly maintain its equipment and was therefore arguably in breach of the lease, HDCR still failed to show resulting damages. As noted, HDCR repeatedly took the position in its opposition that the building's closure for failure to cure citations was the cause of its damages, not the electrical fire: "Yet, in this instance, the negligence of landlord *in failing to cure the citations, leading to the closure of the Property is the very reason for the damages sought in this case*." (Italics added.) On the next page of its opposition, HDCR referred to Garrity's declaration as evidence that the electrical fire was HPT's fault, but then stated: "Yet, even if not caused by HPT, it is clear that the damages suffered by the Plaintiffs were as a result of the Closure *and not the Incident*. And the

evidence shows the Closure was due solely to the unsafe conditions at the Property and not a lack of electricity or electrical equipment." (Italics added.) At oral argument on the summary judgment motion, HDCR's attorney stated: "I think the point is that our damages arose before the incident. The damages of my clients they suffered before the incident ever happened. . . . The liability and the damages arose prior to DWP coming on the scene and prior to the incident and so I would just submit on that, your honor."

With respect to Mehdizadeh, HDCR put forth no evidence to contradict his declaration that he never individually entered into a contract with HDCR. An agent cannot be held liable for breach of a contract to which he is not a party. (*Filippo Industries, Inc. v. Sun Ins. Co*. (1999) 74 Cal.App.4th 1429, 1443; *Bensara v. Marciano* (2001) 92 Cal.App.4th 987, 992 [An individual agent does not become a party to an agreement merely by signing on behalf of a company which is a party].)

E. Fraud Causes of Action

The FAC alleged that in order to induce HDCR to enter into its lease, HPT, Rouholla Mehdizadeh and Samson Marian made misrepresentations to HDCR. The misrepresentations alleged in the FAC mirror the lease's so-called "warranty" provisions alleged in the breach of contract claim. The FAC further alleged that subsequent to entering into the lease, these defendants made additional misrepresentations that repairs had been made, and the attorney for the building's management company also falsely stated that the building's management was in compliance with all laws.

To prevail on a claim for fraud and deceit, a plaintiff must prove (1) misrepresentation (false representation, concealment, or nondisclosure), (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 184.) Similarly, a party claiming fraud in the inducement must prove that his consent to the contract was induced by a misrepresentation. (See *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921.)

In its opposition to the motion for summary judgment, HDCR relied on the building citations and the nolo contendere plea to meet its burden of showing a triable issue of material fact on its cause of action for fraud in the inducement. But because we have concluded that this evidence was properly excluded, HDCR failed to meet its burden as a matter of law. Even if it were admissible, HDCR points to no place in these documents showing that any citation was issued or plea entered prior to the time HDCR executed its lease on May 7, 1999, and thus HDCR made no showing of reliance. We have also concluded that the letter of the attorney for the management company was properly excluded. Therefore, HDCR cannot rely on this evidence to prove fraud subsequent to entering into the lease. HDCR did not offer any other admissible evidence of misrepresentations made by anyone representing HPT. There was no evidence of what specifically was said, by whom, to whom or when. HDCR's opposition merely referred to the "numerous misrepresentations repeatedly noted throughout the Complaint, along with all of the documents filed in both this case and the related bankruptcy." But a plaintiff opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2); *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411.) Thus, HDCR failed to establish a triable issue of material fact on its fraud claims.

F. Negligence Cause of Action

The FAC alleged that the moving parties were negligent in failing to properly maintain the building, comply with health and safety regulations and provide the warranties in the lease. To prevail on a claim for negligence, a plaintiff must prove (1) a legal duty to use due care, (2) a breach of such duty, and (3) the breach was the proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917–918.)

HDCR's written opposition to the summary judgment motion addressed its negligence claim in four conclusory sentences without any citation to the evidence. On appeal, HDCR argues that Schneiderman's declaration stated that "the elevators, the air conditioning system and the like. . . . were not in working order." But the problem with this argument is that HDCR presented no admissible evidence of damages caused by these alleged conditions. As to any damages allegedly caused by the closure of the building, HDCR offered no admissible evidence that the moving parties were the cause of the closure. Accordingly, HDCR failed to establish a triable issue of material fact on its negligence claim.

G. Conversion[6]

The FAC alleged that the moving parties have kept and possessed HDCR's security deposit, prepaid rents, and all of its personal property and tenant improvements at the building, and have refused to return these items. To prevail on a claim for conversion, a plaintiff must provide (1) the plaintiff's ownership or right to possession of personal property, (2) defendant's disposition of the property inconsistent with the plaintiff's rights, and (3) resulting damage. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.)

In its opposition, HDCR failed to address its conversion claim with respect to the return of the security deposit and prepaid rents. The only evidence submitted in this regard was the statement in Schneiderman's declaration that he has "never been repaid for the security deposit, the prepaid rent or anything else for that matter." But HDCR did not submit evidence of any request it made for return of these monies or the amount allegedly owed, point to any lease provisions showing that HPT was obligated to pay these monies, or demonstrate that HPT was still responsible for repayment after the building was closed by the City.

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6 The FAC's seventh cause of action is for imposition of a constructive trust. But a constructive trust is an equitable remedy, not a cause of action. (See *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 Cal.App.3d 371, 375.)

With respect to HDCR's personal property, it was undisputed that after the occurrence of the electrical fire the City and fire officials strictly limited entry to the building. The moving parties submitted evidence showing that HPT arranged times with the City and the fire department for tenants to retrieve their personal property and sent notices of such opportunities to HDCR's attorney. We are satisfied that there is no triable issue of material fact as to the cause of action for conversion.

III. Motion to Quash

HDCR contends the trial court committed reversible error in granting respondent Samson Marian's motion to quash service of summons and complaint. We disagree.

The record shows that when the instant lawsuit was filed in 2002 Marian was named as a defendant. A proof of service filed on November 6, 2002 indicated that substituted service was made on November 2, 2002 by leaving copies of the summons and complaint with an individual identified as "Lisa" at 100 Hilgard Avenue, Beverly Hills, California. The proof of service also stated that the process server went to the house three times; twice no one was home and the third time he was told Marian was not home. Copies of the summons and complaint were mailed to the same address. Marian never filed an answer to the complaint.

Ten years later on November 29, 2010, HPTTA filed a request to enter Marian's default. His attorney learned of the request on December 2, 2010 from HPT's attorney.

On January 19, 2011, Marian filed a motion to quash service of summons and complaint on the ground that the service was statutorily defective. Marian submitted a declaration stating that while he moved to 100 Hilgard with his wife in 1995, in December 2001 or January 2002 he separated from her and stopped living at the Hilgard address. He had no recollection of anyone named "Lisa" ever residing or working at that address and had no idea who she could be. He did not receive the summons and complaint until informed of the request for his default. HDCR opposed the motion, which the trial court granted.

Code of Civil Procedure section 418.10, subdivision (a)(1) provides that "A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion . . . [¶] (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her." "Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional. Absent such service, no jurisdiction is acquired by the court in the particular action." (*Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 832.) Code of Civil Procedure section 415.20, subdivision (b) provides that "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, . . . a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, . . . in the presence of a competent member of the household . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left."

A plaintiff bears the burden of proving the service was valid and that jurisdiction exists. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413; *Kroopf v. Guffey* (1986) 183 Cal.App.3d 1351, 1356.) In this regard, the "plaintiff must do more than merely allege jurisdictional facts. It must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant." (*In re Automobile Antitrust Cases I & II* (2005) 135 CalApp.4th 100, 110.) "Where the evidence of jurisdictional facts is not in conflict, we independently review the trial court's decision. [Citation.] To the extent there are conflicts in the evidence, we must resolve them in favor of the prevailing party and the trial court's order." (*Malone v. Equitas Reinsurance Ltd*. (2000) 84 Cal.App.4th 1430, 1436.)

Here, the substituted service did not comply with the statutory requirements. First, service was not made at Marian's "dwelling house" or "usual place of abode." Marian's declaration established that by the time service of process was made at 100 Hilgard Avenue in November 2002, he had not been living at that address for approximately

11 months. In its opposition to the motion to quash, HDCR argued that Marian should have presented more competent evidence as to where he was actually living at the time service was made, such as a lease, deed, utility bill or telephone bill. But this argument ignores that it was *HDCR's* burden as the plaintiff to prove that the requirements of substituted service were met, not Marian's. HDCR presented no factual evidence controverting the truth and accuracy of Marian's statement. Moreover, the testimony of a single witness, if believed by the trier of fact, is sufficient to sustain a finding. (Evid. Code, § 411; *Francis v. City & County of San Francisco* (1955) 44 Cal.2d 335, 340.)

Second, there was no showing by HDCR that substituted service was made on an appropriate individual. The statute requires that the summons and complaint be left with a "competent member of the household . . . . at least 18 years of age." (Code Civ. Proc., § 415.20, subd. (b).) Here, the proof of service states that copies of the summons and complaint were left with a person named "Lisa," without providing any other identifying information. The proof of service itself specifically requires the process server to state the "name and title or relationship to person served," but this information is missing. Marian declared that he had no idea who "Lisa" could be. There was no evidence to contradict this statement. Additionally, even though the process server stated in his declaration that a woman "much older than eighteen years of age" answered the door, there was no evidence from which to determine whether this woman was competent or a member of the household, as the statute requires.

Finally, we reject HDCR's argument that the motion to quash was untimely. Code of Civil Procedure section 418.10, subdivision (a)(1) expressly permits the motion to be brought "within any further time that the court may for good cause allow." Moreover, the request to take Marian's default was filed on November 29, 2010, which was *10 years* after the lawsuit was filed, and the motion to quash was filed six weeks later. Furthermore, HDCR's argument that Marian had been a party to a related case is irrelevant if he was never properly served in this case.

We conclude the trial court did not err in granting the motion to quash service of summons and complaint.

DISPOSITION

The summary judgment and orders denying the motion for leave to amend the FAC and granting the motion to quash service of summons and complaint are affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ